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IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

HOECHST CELANESE CORPORATION,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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BRIEF *AMICI CURIAE* OF AMERICAN AUTOMOBILE MANUFACTURERS ASSOCIATION, AMERICAN FIBER MANUFACTURERS ASSOCIATION, AMERICAN PETROLEUM INSTITUTE, CHEMICAL MANUFACTURERS ASSOCIATION, CORPORATE ENVIRONMENTAL ENFORCEMENT COUNCIL, NATIONAL ASSOCIATION OF MANUFACTURERS, PHARMACEUTICAL RESEARCH AND MANUFACTURERS OF AMERICA AND TEXAS CHEMICAL COUNCIL IN SUPPORT OF PETITIONER

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INTEREST OF *AMICI CURIAE* [1]

The American Automobile Manufacturers Association ("AAMA"), American Fiber Manufacturers Association

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[1] This brief is filed with the written consent of the parties, pursuant to Rule 37.2(a) of the Rules of this Court. Letters of consent are on file with the Clerk of the Court. Pursuant to Rule 37.6,

("AFMA"), American Petroleum Institute ("API"), Chemical Manufacturers Association ("CMA"), Corporate Environmental Enforcement Council ("CEEC"), National Association of Manufacturers ("NAM"), Pharmaceutical Research and Manufacturers of America ("PhRMA") and Texas Chemical Council ("TCC") file this brief as *amici curiae* in support of Hoechst Celanese Corporation's ("HCC") Petition for A Writ of *Certiorari* to review the judgment of the United States Court of Appeals for the Fourth Circuit.

AAMA is the trade association comprised of the major United States-based automobile manufacturing companies — Chrysler Corporation, Ford Motor Company and General Motors Corporation. AAMA's member companies own and operate 276 assembly and component manufacturing facilities nationally.

AFMA represents U.S. companies that manufacture and sell synthetic and cellulosic fibers. AFMA member companies produce more than 90% of the total U.S. output of these fibers.

API is a national trade association representing more than 400 member companies involved in all aspects of the oil and gas industry, including exploration, production, refining, transportation, distribution and marketing of petroleum and petroleum products.

CMA is a non-profit trade association whose member companies represent more than 90% of the productive capacity for basic industrial chemicals in the United States. Many CMA members, including HCC, are subject to the benzene NESHAP at issue in this case.

Amici state that this brief was authored in its entirety by counsel for *Amici*. *Amici* CMA, CEEC, NAM and PhRMA also participated as *amici curiae* in the proceedings before the Fourth Circuit Court of Appeals.

CEEC is a nonprofit organization of 18 diverse companies with strong environmental programs and commitments. CEEC focuses exclusively on environmental enforcement policy issues, in an attempt to ensure that environmental enforcement is consistent with and advances the goal of our environmental laws.

The NAM is the nation's oldest and largest broad-based industrial trade association. Its nearly 14,000 member companies and subsidiaries, including 10,000 small manufacturers, employ approximately 85% of all manufacturing workers and produce over 80% of the nation's manufactured goods. More than 158,000 additional businesses are affiliated with the NAM through its Associations Council and National Industrial Council.

PhRMA represents the country's leading research-based pharmaceutical and biotechnology companies. Central to PhRMA's purposes as an organization is the representation and protection of the interests of companies that discover, develop, and bring prescription drugs to market. This industry depends on the ability to rapidly adapt production to introduce new, life-saving medicines to meet the demand for these drugs.

TCC is a non-profit association representing chemical manufacturers in the State of Texas. Its 97 member companies represent about 25% of the State's manufacturing economy. TCC members have over $40 billion invested in Texas facilities and result in the employment of over 450,000 Texans with a total annual payroll of over $15 billion. As a trade association in a state that had corresponded with EPA on this subject, TCC is vitally interested in the outcome of this action.

All of *Amici's* members are heavily regulated by EPA and other agencies, and are committed to complying with the law. *Amici* have tens of thousands of members, ranging from small businesses to large multinational corporations, who collectively have facilties in each of the fifty

states. *Amici* have a vital interest in seeing that regulatory requirements are clear, well-publicized and consistently applied across the country. *Amici* similarly believe that regulatory enforcement must be fair and that enforcement actions should focus on clear cases of non-compliance, rather than on cases involving the application of non-authoritative or inconsistent interpretations of national regulations.[2]

SUMMARY OF ARGUMENT

Nominally, the Petition for *Certiorari* concerns the ruling of the Fourth Circuit on the meaning of an exemption set forth in a rule promulgated by the United States Environmental Protection Agency ("EPA") on June 6, 1984, as part of benzene emission standards known as the National Emisssion Standard for Equipment Leaks (Fugitive Emission Sources) of Benzene (the "benzene NESHAP"). In reality, the impact of the Fourth Circuit's decision is unfortunately much broader. At the heart of *Amici's* interests is their concern that the judgment of the Fourth Circuit will create uncertainty and disrupt environmental and other federal regulatory programs that impact almost every aspect of the operations of *Amici's* members.[3]

Of principal concern to *Amici* is the Fourth Circuit's ruling that the interpretation of a nationally applicable regulation by one of EPA's regional offices binds persons within that office's geographic jurisdiction, regardless of whether its interpretation conflicts with interpretations of other regional offices, or even if it conflicts with other interpretations from within the same office. (*See* Pet.

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[2] As *Amici's* members include literally tens of thousands of businesses across the country, this brief should not necessarily be regarded as the view of any one organization or company.

[3] Although *Amici* often refer to environmental impacts as examples in this brief, as noted above, the opinion of the Fourth Circuit has broad ramifications that extend well beyond the environmental law contect.

App. at 23a-24a.) If left to stand, the Fourth Circuit's opinion means that every regional office of a federal administrative agency can establish its own binding interpretation of a national regulation. For environmental programs, this could result in the creation of ten sets of rules, as EPA has ten regional offices. As a result, *Amici's* members would find that a federal regulation in one state means something different in another state, even as applied to identical facilities and processes. Indeed, that is precisely what happened to the Petitioner in this case.

The opinion below will also likely result in conflicts among the circuits. If a particular regional office interpretation is upheld by a Federal Court of Appeals, it becomes the law of that circuit. However, another regional office may interpret a regulatory requirement differently, and its interpretation could become the law in a different circuit. In addition, the opinion of the Fourth Circuit could lead to intra-circuit conflicts, because the jurisdictions of EPA's regional offices do *not* parallel those of the federal circuits.

Amici have other substantial concerns with the Fourth Circuit's decision. HCC's Petition describes a now all too common occurrence for *Amici's* members—enforcement actions alleging regulatory violations based solely on non-authoritative and non-published agency interpretations of the meaning of regulatory requirements. Citizens and regulated entities were previously able to rely on the courts to remedy the situation. No such meaningful review can occur, however, when agencies revise regulations through unpublished, nonauthoritative interpretations *and* courts incorrectly apply this Court's decisions by deferring to such interpretations.

Amici are also concerned about the due process implications of the Fourth Circuit's opinion. Although the Fourth Circuit determined that EPA had not initially provided fair notice of the interpretation Region IV applied, it did not allow HCC a meaningful opportunity to achieve

compliance once it learned of the Region IV interpretation. HCC was also denied the opportunity to utilize the two-year compliance waiver available to every member of the regulated community to whom the regulation applied. Instead the court required HCC to fully comply within ninety days of its receipt of the EPA Region IV interpretation. Thus, the Fourth Circuit failed to rectify the very due process violations it had identified. *Amici* believe that elemental notions of due process require that individuals and firms in HCC's position must be allowed as much time to comply with a regulatory requirement as they would have had if an agency had provided proper notice *ab initio*.

ARGUMENT

I. THE FOURTH CIRCUIT'S DECISION CREATES TREMENDOUS UNCERTAINTY IN THE REGULATED COMMUNITY, UPSETS THE UNIFORM ADMINISTRATION OF FEDERAL REGULATORY PROGRAMS, AND LEADS TO CONFLICTS AMONG AND WITHIN THE CIRCUIT COURTS OF APPEALS

The Fourth Circuit concluded that regional offices of an administrative agency can establish authoritative interpretations of regulations that bind affected parties within their regions, notwithstanding that other regions have adopted contrary interpretations. If allowed to stand, that holding has the potential to upset any federal program requiring the application of uniform standards.

The Fourth Circuit deferred to EPA Region IV's interpretation of the benzene NESHAP exemption, (Pet. App. at 12a), even though other EPA regions had interpreted the exemption differently.[4] The Fourth Circuit also held

[4] Facilities that "use" less than 1,000 Mg/yr of benzene are exempt from the regulation. 40 C.F.R. § 61.110(c). The 1989 Region IV "multiple counting" interpretation of the term "use" requires facilities to measure the same benzene again and again as it is recycled through the equipment. That interpretation was "based on," (Pet. App. at 66a), an unpublished 1984 EPA internal

that HCC was bound to comply with the interpretation "from the EPA Regional Office responsible for the State of South Carolina where the plant in question is located—regardless of any conflict with previous guidance received . . . from an [authorized] agency with no authority in South Carolina," (Pet. App. at 24a), because only that office had enforcement authority over HCC. (*See* Pet. App. at 23a.)

This means that, as in HCC's case, similar facilities engaged in the same activities under the same nationally applicable regulation can be subject to different regulatory requirements in different agency regional office jurisdictions. Such a result is simply not acceptable. *See, e.g., Miner v. FCC*, 663 F.2d 152, 157 (D.C. Cir. 1980) ("[T]he Rule of Law requires that agencies apply the same basic standard of conduct to all parties appearing before them"); *Contractors Transport Corp. v. United States*, 537 F.2d 1160, 1162 (4th Cir. 1976) ("Patently inconsistent application of agency standards to similar situations lacks rationality and is arbitrary").

Where federal administrative agencies develop and implement uniform national standards pursuant to national legislation, such as under the Clean Air Act, 42 U.S.C. § 7401, et seq., agencies must assure that those standards are fairly and evenly applied. When the agency fails, the courts must protect the public from arbitrary agency action by deferring only to consistently applied and authoritative interpretations. *See, e.g., Western States Petroleum Ass'n v. EPA*, 87 F.3d 280, 285 (9th Cir. 1996); *Homemakers North Shore, Inc. v. Bowen*, 832 F.2d 408, 412 (7th Cir. 1987).

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staff memorandum that interpreted the term "use" to mean benzene "throughput," not just consumption. (Pet. App. at 12a; 30a-31a.) This internal memorandum was in turn distributed to EPA regional offices and subsequently became the basis for a number of conflicting "interpretations" of the scope by the exemption by different EPA regions and States. (Pet. App. at 11a-12a; 62a; 65a.)

In addition to causing conflicts within agencies, the Fourth Circuit's decision will inevitably lead to conflicts among the Federal Courts of Appeals. When those courts rule on a regional office's interpretation of a regulation, that decision becomes the law of a circuit. Rulings on inconsistent regional office interpretations of the same regulation in different circuits will create conflicting precedent. *See Homemakers,* 832 F.2d at 412 (7th Cir. 1987). This result, like the regional inconsistencies themselves, would cause uneven administration of national rules, create tremendous uncertainty and make compliance difficult. Indeed, for many of *Amici's* members compliance may be impossible because EPA's ten administrative regions do not geographically parallel the jurisdictions of the Federal Courts of Appeals.

The regulated community devotes substantial resources to understanding and complying with environmental regulations and in many cases exceeding compliance with them. Compliance becomes problematic at best, however, if it is not possible to rely upon agency regulations or if a regulated entity is forced to choose between competing regional office interpretations. Sound business planning requires certainty, but the Fourth Circuit's decision would, if not reversed, lead to multiple and inconsistent agency interpretations of the same regulatory requirement. This Court should not allow this result to occur.

II. THE FOURTH CIRCUIT'S DEFERENCE TO AN EPA REGIONAL OFFICE REGULATORY INTERPRETATION CANNOT BE RECONCILED WITH THE DECISIONS OF THIS COURT

This Court has repeatedly indicated that deference should be given to interpretations by an agency of its own rules.[5] This Court's rule of deference to agency interpretations is based on at least three related considerations:

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[5] *E.g., Martin v. Occupational Health & Safety Comm'n,* 499 U.S. 144, 150 (1991); *Ford Motor Credit Co. v. Milhollin,* 444 U.S. 555,

- Agency interpretations involve the application of agency-wide expertise and judgment grounded in policy concerns conducted under authority delegated to the agency by Congress; [6]
- Agencies are presumed to have greater familiarity [illegible] expertise with the policy issues implicated by an interpretation than courts; [7] and
- An agency is in the best position to know what it meant when it issued its regulations.[8]

Each of these considerations presumes that the interpretation at issue represents the official, considered and authoritative interpretation of the agency, and this Court has looked for and noted the indicia of an "authoritative" agency interpretation as support for giving deference. One such indicator is publication or wide dissemination of the interpretation. *See, e.g., Ford Motor Credit Co. v. Milhollin,* 444 U.S. 555, 566 (1980); *Udall v. Tallman,* 380 U.S. 1, 4 (1965); *Bowles v. Seminole Rock & Sand Co.,* 325 U.S. 410, 417 (1945). Another indicator of an "authoritative" interpretation is whether it reflects a consistently held view of the agency. *See, e.g., Martin v. Occupational Health & Safety Comm'n,* 499 U.S. 144, 157 (1991); *Pauley v. BethEnergy Mines, Inc.,* 501 U.S. 680, 698-99 (1991); *Ford Motor Credit,* 444 U.S. at 557;

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566 (1980); *Udall v. Tallman,* 380 U.S. 1, 4, 16 (1965); *Bowles v. Seminole Rock & Sand Co.,* 325 U.S. 410, 414 (1945).

[6] *See, e.g., Martin,* 499 U.S. at 151; *Ford Motor Credit,* 444 U.S. at 566, 568.

[7] *See, e.g., Thomas Jefferson University v. Shalala,* 114 S.Ct. 2381, 2387 (1994); *Martin,* 499 U.S. at 152-53; *Pauley v. BethEnergy Mines, Inc.,* 501 U.S. 680, 697 (1991); *Ford Motor Credit,* 444 U.S. at 566 n.9.

[8] *See, e.g., Martin,* 499 U.S. at 152-53; *Mullins Coal Co., Inc. v. Director, Office of Workers' Compensation Programs,* 484 U.S. 135, 159 (1987); *Ford Motor Credit,* 444 U.S. at 566; *Seminole Rock,* 410 U.S. at 417.

Tallman, 380 U.S. at 4; *Seminole Rock*, 325 U.S. at 417-18.

That an interpretation is an *authoritative* interpretation of the agency is the foundation on which the deference principle rests. If the interpretation at issue is not authoritative—if it does not reflect the final view of the agency, as an agency, applying its considered expertise and judgment—there is no basis for giving deference.[9] *See Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 212 (1988).

EPA itself has recognized the difference between authoritative agency interpretations and non-authoritative interpretations of a regional office. For example, in *CWM Chemical Serv., Inc.*, TSCA Appeal No. 93-1, 6 E.A.D. 1 (E.A.B. May 15, 1995), EPA's Environmental Appeals Board ("EAB")[10] rejected an EPA regional office's interpretation of a regulation where there was no agency-wide written embodiment of that interpretation of which the respondent could have had notice—only the beliefs and opinions of individuals within the agency. The EAB reasoned that where the agency had not taken a formal position on the issue, there was no authoritative interpretation, or as the EAB succinctly stated: "[One simply] cannot have 'notice' of a non-existent rule." *CWM Chemical Serv.*, 6 E.A.D. at 15.

In this case, the court erred by not evaluating whether the regional office interpretation it applied met the standard for an authoritative agency interpretation to which

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[9] In addition, *Amici* believe that it was not appropriate for the Fourth Circuit to have utilized a standard so deferential that it effectively forecloses meaningful judicial review of agency interpretations. *Amici* share HCC's concern regardig the lower courts' abdication of judicial review (Pet. at 11), and believe it is an important independent basis justifying review by this Court.

[10] The EAB, established in 1992, is the final agency decision maker in administrative appeals arising under environmental statutes administered by the EPA.

deference is owed.[11] It also erred because, looking to the criteria identified by this Court, the Region IV interpretation is not an authoritative agency interpretation.

A. The Interpretation Was Not Authoritative Because It Was Not Consistently Applied By The Agency

The Fourth Circuit recognized that there were a series of contradictory interpretations of the term "use" in the benzene NESHAP by EPA regional offices and state agencies. (Pet. App. at 23a.) In his dissent, Judge Niemeyer emphasized that, in fact, there was no agency-wide, consistently held interpretation of the proper way to measure "use" under the regulation.[12] The States of Virginia and Texas (where Petitioner has plants similar to the one in South Carolina at issue in this case) each filed an *amicus curiae* brief below explaining, among other things, that Region IV's interpretation represented a change from what had been communicated to those states as the appropriate interpretation of the regulation.[13]

When Region IV notified HCC of its interpretation in June 1989, "EPA" had endorsed at least three different

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[11] As a result, deference was given to an interpretation that simply mak s no sense. The common sense example HCC uses best illustrates the irrationality of Region IV's position, *i.e.*, by analogy to the "use" of motor oil in an automobile, instead of four, five or six quarts, Region IV would have us believe that an automobile "uses" thousands of quarts of oil a year because of the constant recirculation of the same oil in an engine. (Pet. at 4.)

[12] The District Court also found that "EPA's regional offices were inconsistent as to how the regulation should be applied, and on various occasions from 1984 through at least 1990, told inquiring companies that the exemption was to be based on a single counting of recycled benzene." (Pet. App. at 65a.)

[13] *See* Brief of *Amicus Curiae* Texas Natural Resources Conservation Commission at 2; Brief of *Amici Curiae* Commonwealth of Virginia and Virginia Department of Environmental Quality at 4, *United States v. Hoechst Celanese Corporation*, 128 F.3d 216 (4th Cir. 1987) (Nos. 96-2003, 96-2051).

methods of measuring "use," and had not issued any national guidance to clarify which approach, if any, represented agency policy. (Pet. App. at 32a.) In fact, *there were even different interpretations within Region IV*. At the same time Region IV was sending its letter to Petitioner and interpreting the appropriate measure of "use" as "throughput," Region IV also sent a letter to another facility indicating that the appropriate measurement was "consumption." (Pet. App. at 68a & n.22. *See also* Pet. App. at 69a n.23.) Thus, it cannot be said that the regional office—much less the Agency, as an *agency*—had made an authoritative interpretation entitled to deference from the Fourth Circuit. *Cf. Seminole Rock*, 325 U.S. at 417-18 (deference was appropriate where the agency had maintained a uniform interpretation "in . . . countless explanations given to inquirers affected" by the regulation).

Rather, as the District Court and Judge Niemeyer recognized, no authoritative agency interpretation of the regulation existed in June of 1989:

> [Region IV's] notice should not, against the background of inconsistent EPA interpretations over time and throughout different regions, constitute a definitive agency-wide EPA notice such that penalties could be imposed for non-compliance with one interpretation. For these reasons, I firmly believe . . . that the 1989 Region IV notice should not be considered the 'authoritative interpretation' of the EPA.

(Pet. App. at 33a (dissent); *See also* Pet. App. at 68a.) There was no single construction of the regulation that was consistently applied, and no construction that was published or widely disseminated. These circumstances indicate that EPA, as an agency, had not formulated or articulated an authoritative interpretation of the term "use." Accordingly, the Fourth Circuit erred when it deferred to the voice of Region IV alone above the other competing voices.

B. The Interpretation Was Not Authoritative Because It Was Neither Published Nor Widely Disseminated By The Agency

Although this Court has not expressly held that only published agency interpretations are entitled to deference, various opinions reflect the importance of publication as an indication that the interpretation is authoritative; *i.e.*, that it represents the final and considered view of the agency, and not the views of individuals. *See, e.g., Ford Motor Credit,* 444 U.S. at 566-67; *Tallman,* 380 U.S. at 4; *Seminole Rock,* 325 U.S. at 417.[14]

There are strong policy reasons why this Court has looked to publication before giving deference. Publication provides some assurance that interpretations are authoritative agency interpretations, and that they are created with care and deliberateness. Moreover, the regulated community must be able to identify and to rely on the plain meaning of the regulations and authoritative, published constructions of those regulations when necessary. This is critical, because the community cannot comply with unknown requirements. Similarly, publication informs agency staff of agency interpretations and aids them in applying rules consistently, uniformly and fairly. *Cf. Morton v. Ruiz,* 415 U.S. 199, 232 (1974) (the publication requirement of the Administrative Procedure Act was designed to "avoid the inherently arbitrary nature of unpublished *ad hoc* determinations.")[15] *See generally*, Man-

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[14] Consistent with due process, certain lower courts have held that it is simply not proper to defer to unpublished agency interpretations of regulations. *See, e.g., Federal Labor Relations Auth. v. United States Dept. of Navy,* 966 F.2d 747, 762 (3d Cir. 1992).

[15] *Amici* are also concerned that the Region IV interpretation affects a substantive change to the meaning of the regulation. Agencies cannot rewrite regulations through reinterpretation. *See, e.g., United States v. Trident Seafoods Corp.,* 60 F.3d 556, 559 (9th Cir. 1995); *Director, Office of Workers' Compensation Programs v. Mangifest,* 826 F.2d 1318, 1324 (3d Cir. 1987); *Homemakers North*

ning, J., *Constitutional Structure and Judicial Deference To Agency Interpretations of Agency Rules,* 96 Colum. L. Rev. 612, 654-68 (April 1996).

III. THE FOURTH CIRCUIT'S DECISION NULLIFIES IMPORTANT CONSTITUTIONAL DUE PROCESS PROTECTIONS

The Due Process Clause of the Fifth Amendment requires that the Federal Government provide regulated entities with fair notice of regulatory interpretations affecting them. The Fourth Circuit erred in concluding that HCC received fair notice when it received a letter from EPA Region IV that conflicted with prior interpretations from EPA Region VI. The Fourth Circuit compounded this error when it allowed HCC only ninety days to comply with Region IV's interpretation, while regulated entities who had timely notice that they were subject to the regulation had the opportunity to obtain a two-year compliance waiver.

A. The Fourth Circuit Erred In Concluding That Conflicting Agency Interpretations Of A Regulation Provide Fair Notice

The Fourth Circuit correctly concluded that, prior to 1989, HCC had not received "fair notice" of Region IV's interpretation of the benzene NESHAP. The court found that HCC's understanding of the exemption was reasonable, that five years earlier, HCC had received a different interpretation of the exemption with respect to its similar plants in Texas (located in EPA Region VI) from Region VI and the Texas Air Control Board

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Shore, Inc. v. Bowen, 832 F.2d 408, 412-13 (7th Cir. 1987). Stated another way, if EPA wants to change its benzene NESHAP regulation, it must follow notice and comment rulemaking. *See National Family Planning and Reproductive Health Ass'n, Inc. v. Sullivan,* 979 F.2d 227, 234 (D.C. Cir. 1992).

("TACB"),[16] and that Region VI had not objected to an exemption and waiver granted to HCC's Texas plants by the TACB based on the Region VI and TACB interpretations. (Pet. App. at 17a-18a.)

But, the Fourth Circuit erroneously concluded that the 1989 Region IV letter provided HCC with "actual notice" of the EPA's interpretation of the exemption. The Fourth Circuit reasoned that, notwithstanding that HCC had received conflicting interpretations of the exemption, because Region IV had enforcement authority over the Celriver Plant, Region IV's interpretation was the "authoritative interpretation" for Celriver. (Pet. App. at 23a-24a.)

Although Region IV's 1989 letter made HCC aware that Regions IV and VI interpreted the NESHAP exemption requirement differently, those letters did not resolve which of these two interpretations was authoritative. From HCC's perspective, there was no reason to believe that Region IV's interpretation was more authoritative than the longstanding interpretation of Region VI. In fact, the Region IV letter indicated that its interpretation was "based upon" agency memoranda from the same period as the interpretations Petitioner previously received from Region VI and the TACB. (Pet. App. at 66a.)

Where different EPA regional offices disagree as to the proper interpretation of a regulation, it would be unfair to conclude that HCC or any other member of the regulated community could reasonably ascertain which interpretation is authoritative. *Cf. Rollins Envtl. Serv. (NJ), Inc. v. EPA*, 937 F.2d 649, 653 (D.C. Cir. 1991). Stated another way, the law cannot require the regulated community to reach a conclusion as to which regional interpretation is correct.

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[16] The TACB was authorized by EPA to administer the benzene NESHAP in Texas, and had consulted with Region VI before providing its interpretation of the NESHAP exemption to HCC. (Pet. App. at 64a n.19.)

Indeed, it is contrary to EPA policy to interpret nationally applicable rules, such as the benzene NESHAP (a *National* Emission Standard for Hazardous Air Pollutants), differently in different EPA regions. EPA has promulgated regulations to avoid just this result:

> It is EPA's policy to . . . [a]ssure fair and uniform application by all Regional Offices of the criteria, procedures and policies employed in implementing and enforcing the [Clean Air A]ct.

40 C.F.R. § 56.3(a) (1997).

Accordingly, HCC's knowledge of conflicting "authoritative" interpretations from other regions, and states with delegated federal programs, effectively precluded HCC from knowing with "ascertainable certainty" what its obligations were under the benzene NESHAP. *See General Electric Co. v. EPA*, 53 F.3d 1324, 1329 (D.C. Cir. 1995).

B. The Fourth Circuit's Ruling Denies Petitioner A Reasonable Opportunity To Comply

Inherent in the idea of requiring fair notice before imposing sanctions is the principle that the person must be given a reasonable opportunity to meet the requirement. It is not enough that it receive absolution from any liability for relevant pre-notice conduct. As this Court explained in *Grayned v. City of Rockford*, 408 U.S. 104 (1972),

> because we assume that man is free to steer clear between lawful and unlawful conduct, we insist that laws give persons of ordinary intelligence *a reasonable opportunity* to know what is prohibited *so that he may act accordingly*.

Id. at 108 (emphasis added).

The Fourth Circuit did not give HCC a reasonable opportunity to "steer clear of unlawful conduct" once it received notice of the Region IV interpretation. HCC was

neither allowed a meaningful opportunity to comply, nor given the opportunity to obtain the two-year compliance waiver available to other regulated entities.

If HCC had received timely notice of the agency interpretation of the NESHAP exemption, it would have had the opportunity that all other regulated entities had to obtain a two-year compliance waiver for purposes of installing the necessary equipment and undertaking the other actions necessary to meet the varied requirements of the benzene NESHAP.[17] But, by the time HCC received the Region IV letter in 1989, the period to apply for a waiver had been closed for nearly five years. *See* 40 C.F.R. § 61.11 (affected sources had 90 days from the effective date of the rule, June 6, 1984, to apply).

If it had received timely notice, HCC contends, and the District Court concluded, it would likely have received such a waiver for its Celriver plant. (Pet. at 25 & n.21; Pet. App. at 70a.) Because the Agency's serious due process violation caused HCC to lose its opportunity to obtain a waiver, HCC must be given at least the same opportunity —*i.e.*, two years—as other similarly situated persons.[18]

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[17] Congress intended that existing facilities should have up to two years to come into compliance where necessary. *See* H.R. Conf. Rep. No. 91-1783, *reprinted in* 1970 U.S.C.C.A.N. 5374, at 5379 (1970).

[18] *See, e.g., Satellite Broadcasting Co., Inc. v. FCC*, 824 F.2d 1, 4 (D.C. Cir. 1987); *McElroy Electronics Corp. v. FCC*, 990 F.2d 1351, 1364 (D.C. Cir. 1993).

CONCLUSION

For the reasons set forth above, and for the reasons set forth in HCC's Petition, *Amici* respectfully request that a Writ of *Certiorari* issue to review the judgment of the United States Court of Appeals for the Fourth Circuit.

Respectfully submitted,

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